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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted].

WILLIAM BECK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petitioner, William Beck, prays that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio made and entered by said Court on the 26th day of June, 1963, a copy of which is attached hereto as Appendix I. (Rehearing denied on the 25th day of September, 1963, which order is appended hereto as Appendix II.)

OPINIONS OF THE COURT BELOW.

No opinion was rendered by the Trial Court, other than a mere determination of guilt. The Ohio Court of Appeals upon consideration of an appeal to it likewise did not render either an official or unofficial opinion, save a mere journal entry affirming the judgment of the Trial Court. (See Appendix III.)

The Supreme Court of Ohio after a consideration of the merits affirmed the judgments of the lower courts. The formal opinion announced by the Supreme Court of Ohio, with two Judges dissenting, was officially published in 175 Ohio St. 73 (1963), and is incorporated herein as Appendix IV.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., § 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW.

I.

Can probable cause for an arrest without a warrant be established by a policeman's testimony that he received a tip from an unnamed and unidentified informer when the defense's demand for disclosure is denied?

II.

Can a state, consistent with the constitution, refuse to require the disclosure of an alleged informer where the existence of probable cause is predicated on information supposedly supplied by such informer?

III.

In making the substantive determination of the reasonableness of a warrantless arrest or search can a state court arbitrarily accept as conclusive the subjective judgment of police officers on the issue of the existence and reliability of an unnamed and unidentified informer?

IV.

Even where there has been a lawful arrest, is the incidental search of the person of the accused without a warrant limited to safeguarding the arrest and the arresting officer?

V.

Is a crime committed in the presence of an officer so as to justify an arrest without a warrant, when the gravamen of such offense is the possession of contraband, which is completely concealed from the officer's view and which is a fact he could not have known prior to the search?

VI.

Where there is time to procure an arrest or search warrant, is any warrantless arrest and search "unreasonable" so as to constitute a violation of the Fourth and the Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATEMENT OF THE CASE.

William Beck, the Petitioner, was charged and convicted of a violation of Revised Code of Ohio, § 2951.111, wherein it was charged that on the 10th day of November, 1961, he had in his possession or under his control, certain illegal gambling slips. Prior to trial the Petitioner moved to suppress certain evidence, which evidence, it was alleged, had been seized in violation of the constitutional prohibition against illegal searches and seizures. Also, it was contended that the use of such evidence seized in violation of the constitution "is by that same authority inadmissible in a state court." This Motion, following a full hearing was denied, and on the merits the judgment herein being challenged was rendered. Petitioner was then sentenced.

In due season, Petitioner appealed this cause: first, to the Ohio Court of Appeals, which merely affirmed this judgment without any discussion. Next, upon its consid-

eration on the merits, the Supreme Court of Ohio affirmed this conviction and later denied a rehearing.

I.

The transcript of the trial evidence, hereinafter referred to as (R), shows as follows:

To support the allegations made in the written Motion to Suppress, the defense gave evidence through Sergeant Carl Delau one of the arresting officers. This officer testified that he was a member of the Cleveland Police Department and that at about 1:00 p.m. on the 19th day of November, 1961, while in the company of several other officers, they stopped Beck shortly after he had turned east from East 115th Street onto Beulah Avenue. The Sergeant further related that they (the officers) did not stop him for any traffic offense. As the Sergeant phrased it "I identified myself and requested him to pull over to the curb". (R. 5). Further testimony was in response to these direct questions:

> "Q. Then you searched his automobile.
>
> A. Yes, I did.
>
> Q. Prior to that, did you indicate to him that he was under arrest?
>
> A. Not while searching the automobile." (R. 5).

The search conducted of Petitioner and his car at that time was not productive of any of the fruits of illegality. However, despite this abortive exploratory search, William Beck was placed under arrest. In this regard the following excerpt of testimony is significant:

> "Q. Why then did you place him under arrest?
>
> A. I placed him under arrest for a clearinghouse operation, scheme of chance.
>
> Q. At that time, you had discovered some evidence of a scheme of chance?

A. I did not.

Q. At the time you placed him under arrest, you did not have any evidence?

A. Other than information.

Q. In other words, you heard rumors?

A. I heard reports and found that he has a record in connection with clearinghouse and scheme of chance.

Q. Previous convictions?

A. Yes.

Q. On this information, you arrested him on the City streets?

A. On Beulah Avenue.

Q. And you searched the automobile?

A. Yes.

Q. Did you find anything as a result of that search?

A. No.

Q. Then what did you do?

A. I conveyed him to the Fifth District, where we searched him.

Q. In other words, you didn't find anything as a result of your search of the automobile?

A. That is correct.

Q. Then he was transported to the Fifth District Station, which is on Chester Avenue?

A. 107th and Chester.

Q. At 107th and Chester, you then searched Mr. Beck?

A. I did.

Q. Prior to your searching of Mr. Beck, he was under arrest?

A. Yes, he was." (R. 6-7.)

II.

Suffice it to say, their search of William Beck at the District Station revealed, secreted in his clothes, some illegal clearinghouse slips.

With regard to the officer's testimony that he had "information," he was specifically asked: "From whom did you get this information?" The response was "I couldn't divulge that information" (R. 11). Counsel for the Petitioner then made a strong argument for the disclosure of the sought for information. The Court after first reserving its ruling on this request that the Court order the witness to answer the question, ruled: "I am not going to order the patrolman to testify as to the name of the informer on the grounds of irrelevancy" (R. 15).

Concerning this latter ruling by the Court, it followed this specific question by the Court:

> "The Court: I have a question officer. When you placed this man under arrest did you place him under arrest for a felony or a belief that a felony had been committed?
>
> The Witness: Under a belief that a felony had been committed, under State law, carrying on a scheme of chance is a felony, on that basis, I arrested him." (R. 14.)

III.

In its opinion the Supreme Court of Ohio ruled: in effect, that in moving to suppress unconstitutionally seized evidence an accused is not making a defense against the charge lodged against him. Thus the Court held:

> "It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him." *State vs. Beck*, 175 Ohio St. 73 (1963).

As regards the existence of probable cause for an arrest without a warrant (and presumably for the issu-

ance of a warrant), according to the challenged authority of this opinion, the police in Ohio are to be delegated the power to justify, with impunity, their own illegal acts by resort even to a fictional or phantom informer as the supplier of requisite probable cause. This is so because, under the Ohio Rule, the mere statement by an officer that such informer exists or gave reliable information is not subject to dispute. Not only this, but such statement is entitled to be viewed, as was done by the Supreme Court of Ohio, as conclusive on the question of: the honesty of the belief of the arresting officer; the reliability of his "informer"; the reasonableness of his reliance on the information supposedly supplied; the existence of probable cause and their right to arrest without a warrant.

Consider in this latter regard, the following holding by the Supreme Court of Ohio in their disposition of this appeal:

> "All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles." Id., 175 Ohio St., at 73.

The dissenting opinion took the position, consistent with numerous pronouncements from this Court that the validity of the search and seizure without a warrant after an arrest is dependent upon the arrest being valid. Id., 175 Ohio St., at 78. Also, it was cogently argued by the dissentors, that: the officer's "conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good faith on the part of the arresting

officer is not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony." Ibid.

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial Petitioner filed a Motion to Suppress the evidence on the ground that his arrest and subsequent search were illegal and unconstitutional. Further that the search conducted was general and/or exploratory and that the use of any evidence so seized infringed on Petitioner's constitutional rights under the Fourth and Fifth Amendments of the United States Constitution.

These issues were further briefed and argued in the trial court, the Ohio Court of Appeals, and the Supreme Court of Ohio. The Supreme Court of Ohio in its formal opinion discussed some of the issues raised therein, and in deciding the merits specifically held that "the search herein without a warrant was justifiable and did not violate * * * [Petitioner's] constitutional rights, and we find no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer." Id., 175 Ohio St., at 77.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The specific question raised by Petitioner's Motion to Suppress was essentially this: was the arrest of the Petitioner and the search of his person legal? If in fact the evidence sought to be suppressed by the Motion was obtained by an illegal search and seizure, it is not admissible over objections, by reason of the constitutional guarantees against illegal searches and seizures (invasion of privacy)

and/or against self incrimination. *Mapp vs. Ohio*, 367 U. S. 643 (1961).

In resolving the question of legality we start with the premise that: The Fourth Amendment to the United States Constitution does not permit the stopping of an individual operating a motor vehicle on a public street, detention of said individual, search of the vehicle, physical deprivation of liberty without probable cause. *Henry vs. United States*, 361 U. S. 98 (1959). And facts developed after the arrest of an individual will not justify or give validity to the act of arresting, this is so even when the items discovered prove to be of a contraband nature. *United States vs. Jeffers*, 342 U. S. 49 (1951). A search is reasonable as an incident to an arrest only if the arrest is lawful. *United States vs. DiRe*, 332 U. S. 581 (1948).

On the other hand, an incidental search is, as the term implies, incident to the arrest. The primary purpose being the arrest with the search purely incidental. An exploratory search, such as was consummated here, is one in which the search is the primary object and the arrest is used as a pretext to justify the search. In these cases, the search is exploratory and for that reason "unreasonable," and being unreasonable is absolutely prohibited by the constitution.

In this cause the officer merely claimed that he saw the Petitioner in a certain vicinity and arrested him on sight, for as he stated, a felony. Why this was an obvious tactic, cleverly designed, to circumvent the law will be easily exposed by the objective consideration surely to be given our cause.

It is our contention, despite testimony of the officer that the arrest followed the search of the car, that the arrest occurred at the point the car was stopped. Now, the significance of the moment of arrest is based on the principles of the Fourth Amendment, which defines the

rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The search of Beck was ruled by Trial Judge to be incident to his arrest (R. 15, 16). The essential question then is: Did probable cause exist for the arrest of William Beck without a warrant?

The undisputed evidence was that the detectives curbed Beck's car and immediately commenced to search it, later taking him to the station where a more thorough search of his person was conducted which disclosed the contraband. If the arrest was not proper the subsequent finding of this evidence could not make it good. Surely, the officer is not to be permitted to justify the arrest by the search and at the same time justify the search by the arrest. This "Boot-Strap" argument has been expressly condemned. See *McDonald vs. U. S.*, 335 U. S. 451 (1948); *Johnson vs. U. S.*, 333 U. S. 10, 16-17 (1947).

Also, and most assuredly, the detectives in calling upon Beck to stop did so by virtue of their official position. This compulsion exercised by the officers then and there, in depriving him of his freedom of proceeding along a public street constituted an arrest. Again, if probable cause did not exist prior to finding the illegal slips, the search cannot be sanctioned; notwithstanding, the contrary view expressed by the Supreme Court of Ohio below.

WHERE AN ARREST IS NOT EXPRESSLY SANCTIONED BY STATUTE, THE ARREST IS UNLAWFUL AND THE INCIDENTAL SEARCH UNREASONABLE.

With a valid warrant, a police officer can arrest for a felony or a misdemeanor. It makes no difference whether or not the crime is committed in his presence. Probable cause in such instances is predetermined or at least should have been. Article IV, U. S. Constitution; R. C. of Ohio, § 2933.22.

The method and time of executing an arrest warrant are set forth in our statute, R. C. of Ohio, § 2935.12, compliance to which is mandatory. On the other hand, many incidental searches, in all other respects reasonable, have been held "unlawful" for failure to comply with the provisions concerning notification to arrestee of purpose and authority. *Miller vs. U. S.*, 357 U. S. 301 (1958).

In Ohio, as elsewhere, a police officer may arrest for any crime, felony or misdemeanor committed in his presence. Revised Code of Ohio, § 2935.03. This right to arrest for a crime not committed in the presence of the police officer is strictly limited for the protection of the public. Thus, a police officer may never arrest for a misdemeanor not committed in his presence. Every such arrest is invalid as is every incidental search.

Our statutes in Ohio also specify when and how a warrantless arrest may be made for crimes not committed in view of an officer. Accordingly, Revised Code of Ohio, § 2935.04 provides in substance that: when a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of such offense, and detain him until a warrant can be obtained. 5 *Ohio Jur.* (2d), Arrest, § 25, pp. 38-39.

To sum up, if the crime is committed in the presence of the police officer he may arrest without a warrant for felonies or misdemeanors. When not committed in his presence, he may make such arrest only if he has probable cause to believe a felony has been committed and probable cause to believe the person arrested committed it. If the arrest is not expressly sanctioned by statutes, the arrest

is unlawful and as a consequence the incidental search unreasonable.

Basically the concept is that no search can ever be made without a search warrant. The only exception, other than waiver or consent, is the search incident to lawful arrest. The real test should always be whether information possessed by the police officer, from personal observation, or from hitherto reliable informants would be sufficient to justify the issuance of a warrant of arrest by a neutral magistrate.

Next, these statutes also provide that persons arrested without a warrant shall be informed of the cause of their arrest. Revised Code of Ohio, § 2935.07. Cf., *Miller v. United States,* cited above. Suffice it to say there is little uncertainty, at least, in this area of the substantive law of searches and seizures. There must be probable cause to make the arrest and there must be a statutory right to arrest. Compliance with these statutes is mandatory and if the arrest is unlawful, the incidental search is unreasonable and the product of such search is not admissible in evidence to convict.

Based on these principles alone, it is apparent that the arrest of this Petitioner cannot pass muster. First, there was no probable cause for the arrest. Next, no crime was committed in the presence of the officer and there was no reasonable ground to believe the felony particularized (and any other felony) was involved. Further, Beck was not informed of the cause of his arrest. Not only this but if this search, conducted under such a frame of reference, is not proper to be designated exploratory, it would be most difficult to even conjure up hypothetically a suitable fact situation for purposes of illustration.

A SEARCH WHICH IS UNREASONABLE FOR A WANT OF PROBABLE CAUSE CANNOT BE MADE REASONABLE BY WHAT THE SEARCH UNCOVERS.

Perhaps the greatest source of difficulty in this whole area of searches and seizures involves a search made without a warrant and, as was done here, pursuant to an arrest without an arrest warrant. Such an arrest is valid (if it is, so is the ensuing search) if it is for a misdemeanor committed in the officers' presence, or when based upon the reasonable grounds relative to a felony as argued above. Cf., *Draper v. United States*, 358 U. S. 307 (1959).

Our problem, however, has to a degree been delimited by the arresting officers' conclusion, adopted by the Supreme Court of Ohio in its opinion, that the arrest for Beck was for a "felony," which the officer stated he believed had been committed by William Beck.

Concededly, it is unnecessary to have evidence sufficient to convict in order to have probable cause for search, seizure or arrest. *Carroll vs. United States*, 267 U. S. 132, 161-162 (1955). The crucial inquiry is whether there was probable cause to believe the "felony" referred to by the officer had been committed. See, Revised Code of Ohio, § 2951.13.

A. When the Identity and Existence of an Allegedly Reliable Informer Is Material to the Establishment of Probable Cause, the Court Must Require Disclosure.

Sergeant Delau (the arresting officer) in his evidence attempted to justify his actions on the basis of "confidential information" that had allegedly been given him (R. 6, 12). Now, the rule that an informer's tip may supply "probable cause" for an arrest or search must be regarded as subject to numerous exceptions and qualifications. *Jones vs. United States*, 362 U. S. 257 (1960); *Draper vs. United*

States, cited above. The narrow purview of our discussion at this juncture is concerned not only with the propriety of the Trial Judges ruling against disclosure; but also the announced view of the Ohio Supreme Court which is in obvious conflict with the supreme law of the land as enunciated by this Court.

At the outset, it should be understood that Ohio does not have a statutory privilege of confidentiality as between the policeman and an informer. Revised Code of Ohio, § 2317.02. Moreover, the Supreme Court of Ohio has expressly held that "* * * a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision." *In Re Story*, 159 Ohio St. 144 (1953). It would thus seem to follow from a bare reading of this privilege statute, which does not confer any status to the policeman-informer relation, that the mere invocation of the doctrine of "expressio unius est exclusio alterius" should have been determinative.

Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have the issues raised by his defense properly determined.

The constitutions of both the State and Federal Government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in Ohio's Revised Code, § 2933.22. In this regard one of the prime issues raised by our Motion was the alleged nonexistence of probable cause. Certainly in this

posture the reliability of the informant, the credibility of the police officer who acted upon the information disclosed, and the soundness of the reason for reliance upon the information are proper matters for exploration by the defense. Thus an accused is entitled to know the identity of the informer, to compel his testimony and then impeach his credibility. *Roviaro vs. United States*, 353 U. S. 53 (1957).

Moreover, where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require such persons' identity disclosed should render the search unlawful and require that evidence obtained from the search and seizure be excluded. See, *United States vs. Blich*, 45 Fed. (2d) 627 (1932, D. C. Wyo), where the District Court ruled that the existence of probable cause could only be properly determined if the identity of the informer were disclosed.

Whether or not the arrest being assailed in this cause was legally done, of course, depends upon constitutional standards. *Ker vs. California*, 374 U. S. 23 (1963). The exact nature of these standards presents a judicial question. And although police officers often feel they have a well-grounded suspicion of a certain person's activities, the test as to whether or not any person's right to privacy can be traversed is of no mean significance. History has of course demonstrated that the zeal of our police, in the great state of Ohio, does not always conform to constitutional standards: *Mapp vs. Ohio*, 81 S. Ct. 1684 (1961), *Haley vs. Ohio*, 332 U. S. 596 (1958).

The word of an informer can supply "probable cause" for an arrest or search in certain qualified instances. The test, as presently stated by this Court in *Draper vs. United*

States, 358 U. S. 307 (1959), seems to support the view that what is observed must jibe with what an informer told him would occur. Further the informer must be reliable; in that, "an uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause." *Contee vs. United States*, 215 Fed. (2d) 324, 327 (1954). Cf., *Worthington vs. United States*, 166 Fed. (2d) 557, 566 (6th Cir. 1948), where the Court ruled:

> "In this case, the officers assumed that some denizen of the underworld was betraying appellant. They did not know who the enemy was, but they decided they would act on the anonymous information given, and that they would arrest appellant and search her home if they found nothing, it was probably assumed that appellant did not have enough standing in her community to question their unlawful conduct."

By the Court not requiring disclosure the status of this alleged confidential source became reduced to an anonymity. Certainly if identity were disclosed the defense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. *Wong Sun vs. United States*, 371 U. S. 471 (1963). Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge. *People vs. Robinson*, 166 Cal. App. 416 (1958).

In the final analysis, the conviction herein being challenged must stand or fall on the determination whether there was probable cause for the arrest, which in turn de-

pends upon not only the existence of an informer but his reliability. By denying the request for disclosure, the right to test the reasonableness of the officers conduct (including but not limited to the reasonableness of his reliance on such informer) was thereby frustrated. The real fault characteristic, in addition to foreclosing even the possibility of a rational appraisal by the Court, is that such procedure permits the policeman to conclusively determine the validity of his own arrest. Why such an approach is not consistent with the constitutional standards developed by this Court is obvious.

In our view the cogent arguments in favor of disclosure are most compelling. Consider, in this regard, the view expressed in *Jones vs. United States*, 271 Fed. (2d) 494, 499 (App. D. C. 1959) where the rule was stated:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from the informer, that his identity be divulged, so that his reliability may be subjected to a meaningful judicial scrutiny rather than accepted on a policeman's word."

Likewise, in *Priestly vs. Superior Court*, 50 Cal. (2) 812, 818 (1958), the California Supreme Court similarly ruled:

> "If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

B. Probable Cause to Arrest Without a Warrant Is a Judicial Question of Fact and Exists Only When the Circumstances Justify the Reasonable Belief That a Felony Has Been or Was Being Committed.

I.

Even if we assume that the Ohio Courts were correct in their rulings denying disclosure, and with this "so called informer" remaining anonymous, if he does exist, still the evidence discloses nothing to justify the original arrest. Moreover, even following the search of Beck's person, which proved fruitful, the ultimate charge lodged against him was a misdemeanor (that is, a charge based on simple possession of the contraband slips, Revised Code of Ohio § 2951.111). This charge is distinguishable from the felony charge for which the officer testified he arrested the Petitioner; i.e., for Carrying on a Scheme of Chance. Revised Code of Ohio, § 2951.13.

II.

The most often quoted statement in the arguments against the quest for suppression of evidence is that the constitution does not prohibit all searches, only those that are unreasonable. And, although it is only on the rarest of occasions that the State Court Prosecutors will not try to justify even obviously illegal police intrusion on the rights of an accused, the law is that State Courts are required to use the proper standards of reasonableness. See, *Ker v. California*, 374 U. S. 23, at page 33.

In determining the issue of reasonableness, where as here, the facts and circumstances established that there was sufficient opportunity to obtain a warrant, can there be any question but that a failure to do so will render an ensuing search unreasonable. A limited exception to this

rule is operative where exigent circumstances justify an officer proceeding without the warrant. *Johnson vs. United States*, 333 U. S. 10 (1947).

Here, however, the officer categorically stated that when he left the police station, on the day of Beck's arrest, he intended to arrest him and was later in the vicinity for that purpose. Stated simply, these officers knew in advance that they were going to arrest Beck, at least the Sergeant so testified What excuse then could justify their failure to obtain an arrest warrant; provided, they could qualify for one. Surely if they could not so qualify, they should not have made the arrest and/or search. However, the fact that they did not even seek a warrant must give rise to the cogent inference that their reason for not doing so was because they knew that on the sparse facts available to them, if they had any, no neutral and detached magistrate would have issued an arrest warrant based on a violation of Revised Code of Ohio, § 2951.12. C. F., *e.g.*, *Giodenello vs. United States*, 357 U. S. 480 (1958).

In this regard, it is also our contention that this failure to even seek a warrant is most significant. This is so when viewed, not only from the posture that the officers could not qualify for the issuance of one, but also, when considering these facts and circumstances as just another example of law enforcement by the Cleveland Police in general and Sergeant (now Lieutenant) Delau in particular. See concurring opinion of Mr. Justice Douglas in *Mapp vs. Ohio*, 367 U. S. 643, at page 671, where it was stated, and rightly so, that the facts of *Mapp* show as would few other cases: "The casual arrogance of those who have untrammelled power * * *.

It may be enough to say that this same officer was the prime arresting officer in the *Mapp* case, and the conduct described in that case, as having been in defiance of the

law, was and is typical of his methods in particular and the Cleveland Police in general.

CONCLUSION.

Where defects in methods employed by over zealous police, to bring about the conviction of an accused are assailed, it does pose difficult problems for any judiciary. Should the Court ignore the methods utilized or should the Courts exclude such evidence when it is obtained as a product of an illegal police intrusion. The die has been cast and the view now adopted was most elegantly expressed in *People vs. Cahan*, 44 Cal. (2d) 434 (1955). There the Court wrote:

> "It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law *** *. Moreover any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the concept of ordered liberty."

Therefore, upon an objective analysis of this cause, we are left with an arrest without probable cause and without a warrant. In addition to this we have a willful failure by the Police to submit to any magistrate the question of the sufficiency of the facts within their knowledge or which they assertedly had reasonable and trustworthy information. All of which, the officer claimed, constituted the predicate for his belief that the arrest of Beck was properly indicated for the stated felony.

Also, and as a direct consequence of the Ohio Court's apparent unwillingness to vindicate those rights restored to Ohio citizens by *Mapp*, there is this revolutionary Ohio rule, announced by our Supreme Court, to the effect that:

the testimony of police officers as to the existence of probable cause and the reliability of an informer is not only conclusive but determinative of those issues.

There is, thus evolved, the query as to whether or not this Court should agree with the Supreme Court of Ohio that it takes less evidence in our State to arrest and search without a warrant than it apparently takes to get one. *City of Akron vs. Williams*, 175 Ohio St. 186 (1963) and *State v. Watson*, 117 Ohio App. 333 (1962).

In *State vs. Watson* (cited above), the Court of Appeals in a case where there was a search warrant held that:

> "An affidavit for a search warrant which states that complainant 'has knowledge from a reliable source' that the things to be searched for are kept in a specified building or buildings, but does not state the facts upon which his belief that contraband goods are there concealed is based, does not comply with the mandatory provisions of § 2933.23, Revised Code."

It is of course true that the revolutionary rule stated by the Ohio Supreme Court does establish a dangerous precedent. Further, such a view should not be countenanced by any implied stamp of approval, which would necessarily flow from a failure by this Court to agree to hear this matter on its merits. This is a particularly disturbing thought when one realizes that if this cause is heard on its merits the conviction and the Ohio rule would both be disapproved.

It is therefore respectfully requested that a writ of certiorari be issued under the seal of this Court to the Supreme Court of Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

JAY B. WHITE,
Attorney for Petitioner.

JAMES R. WILLIS,
Of Counsel.

APPENDIX I.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS (NO. 37808).

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed.

Date: 6/26/63

APPENDIX II.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING APPLICATION FOR REHEARING (37808).

It is ordered by the Court that rehearing in this case is denied.

Date: 9/25/63.

APPENDIX III.

JOURNAL ENTRY, COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, COUNTY OF CUYAHOGA (No. 25890).

July 12, 1962.

This cause came on to be heard on the appeal on questions of law from the judgment of Cleveland Muncipal Court and was argued by counsel for both parties; and upon consideration, the Court finds no error prejudicial to the Appellant, and, therefore, the judgment of Cleveland Municipal Court is affirmed and it is ordered that Appellee recover of Appellant its costs herein taxed.

The Court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing Cleveland Municipal Court to carry this judgment into execution.

APPENDIX IV.

OPINION OF THE SUPREME COURT OF OHIO.

ZIMMERMAN, *J.* Section 2915.111, Revised Code, recites:

> "No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.
>
> "Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. *Ex parte Thorpe*, 66 Ohio App., 128, 32 N. E. (2d), 571, affirmed, 137 Ohio St., 325, 30 N. E. (2d), 335. See, also, *In re Thorpe*, 132 Ohio St., 119, 5 N. E. (2d), 333, and *Smith v. Alvis, Warden*, 72 Ohio Law Abs., 267, 268, 134 N. E. (2d), 868, 869.

The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped the car and searched it, without result. Defendant was then arrested and taken to a police station, and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction.

In response to questions asked him by counsel for the defendant, one of the arresting officers testified as follows:

> "A. I heard reports and found that he [defendant] had a record in connection with clearing house and scheme of chance.
>
> "Q. Previous convictions? A. Yes."

Although there are a number of errors assigned by defendant, only two are of real importance:

1. Were the clearinghouse slips obtained by illegal search and seizure, so as to render erroneous the refusal of the trial court to sustain the motion to suppress?

2. Did the trial court err in refusing to order the police to disclose the identity of the informer?

The search herein took place as an incident of an arrest, and it has been held that a search which is incidental to a valid arrest does not constitute an unreasonable and illegal search. *Harris v. United States,* 331 U. S., 145, 91 L. Ed., 1399, 67 S. Ct., 1098.

Defendant was arrested, without a warrant, for what an arresting officer believed and had probable cause to be-

lieve was the commission of a felony (Section 2915.111, Revised Code). In the circumstances, then, was such arrest valid? Section 2935.04, Revised Code, describes when an arrest may be made without a warrant and reads as follows:

> "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Next, was there probable cause for making the arrest? "Probable cause" is incapable of any exact definition applicable to all cases. However, the Supreme Court of the United States said in *Henry v. United States*, 361 U. S., 98, 102, 4 L. Ed. (2d), 134, 80 S. Ct., 168:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." See, also, *Draper v. United States*, 358 U. S., 307, 3 L. Ed. (2d), 327, 79 S. Ct., 329.

Therefore, a question of fact is presented in each case, and where the facts in the possession of the police are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and that the accused committed it, probable cause is present.

In the hearing on the motion of defendant to suppress, an arresting officer testified that the arrest was made on the basis of information supplied by an informer, coupled with knowledge of defendant's prior history. Here, there was not an arrest merely for an exploratory search. According to the testimony, the police, based on the information they had, were actually looking for the defendant for the purpose of arresting him.

In the present case, the knowledge of the police was predicated partly on information furnished by an informer. This raises the constantly recurring question as to what extent officers may rely and act on that kind of information. Of course, to justify an arrest a police officer need not observe the actual commission of a crime, and it is a matter of common knowledge that law-enforcement officers frequently and necessarily act on information supplied by others and on occasion on "tips" coming from informers.

Did the court err in refusing to compel the disclosure of the name of the informer? Defendant contends that he was entitled to such disclosure to test the credibility of the informer and the reliability and sufficiency of the evidence on which the officers proceeded.

As already noted, law-enforcement officers sometimes base a part of their activities on information supplied them by informers, and the only way to verify the reliability of such information is to make use thereof. Informers often frequent the vicinity where crime is planned, and the revelation of an informer's name would not only destroy his access to information concerning criminal activities but might also result in his sudden demise, thereby discouraging others from becoming informers.

For many years, sound policy has dictated that the names of informers be kept secret. Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. Here the officers acted on the information imparted by the informer plus additional knowledge already in their possession. The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated.

This case is distinguishable from that of *Roviaro v. United States*, 353 U. S., 53, 1 L. Ed. (2d), 639, 77 S. Ct., 623, where the informer not only gave information but took an active part personally in trapping and apprehending the offender. No such situation is evident here.

Finally, nothing in the present case shows that the disclosure of the name of the informer would have been of any real value to defendant. He made no active defense, and by stipulation the case was submitted to the court solely on evidence furnished by the police and introduced at the hearing on the motion to suppress.

We conclude that the search and seizure herein without a warrant was justifiable and did not violate defendant's constitutional rights, and we find no prejudicial error in the refusal of the trial court to require the disclosure of the identity of the informer.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

TAFT, C. J., and GIBSON, J., dissent.

GIBSON, J., dissenting. I concur with the majority that, under well established law, the search of defendant and the seizure of the packet of clearinghouse slips, all without a warrant, were lawful if the search and seizure followed a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. *Weeks v. United States* (1914), 232 U. S., 383, 392; *United States v. Rabinowitz* (1950), 339 U. S., 56. But the validity of the search and seizure without a warrant after an arrest is dependent upon the arrest being valid.

Defendant was arrested without a warrant; hence, the inquiry must turn to whether such arrest was lawful. The Fourth Amendment to the Constitution of the United States and similar provisions of state constitutions, *e. g.*, Section 14, Article I, Ohio Constitution, do not prohibit arrest without a warrant. 6 Corpus Juris Secundum, 579, Arrest, Section 5. The right to arrest without a warrant turns upon (1) the nature of the offense, *i. e.*, whether felony or misdemeanor, and (2) the status of the arrestor, *i. e.*, whether peace officer or citizen. See Sections 2935.03 and 2935.04, Revised Code. In this instance the arrest was made by a police officer, so our inquiry is limited to the right of an officer to make an arrest without a warrant.

Since the rules governing an officer's right to arrest without a warrant vary with the nature of the crime, consideration should be given to whether the crime for which the arrest was made was a felony or a misdemeanor. The arresting officer testified that at 1:00 p. m. on November 10, 1961, he placed the defendant "under arrest for a clearing house operation, scheme of chance." On November 13, 1961, an affidavit was executed by a police officer charging defendant under Section 2915.111, Revised Code, with the possession of a certain quantity of clearinghouse slips. The warrant issued thereon probably charged a violation of Section 2915.111, although the record is not entirely clear on this point, since the deputy clerk issuing the warrant apparently attempted to adapt a form charging a violation of the municipal code.

The arresting officer testified that when he arrested defendant he (the officer) was "under a belief that a felony had been committed under the state law, carrying on a scheme of chance is a felony." In my opinion, however, his conclusion as to whether he was arresting defendant for a felony is not determinative. Mere honesty and good

faith on the part of the arresting officer are not enough. There must also be reasonable grounds for believing that the person arrested has committed an act constituting a felony. I *Harper and James, The Law of Torts*, 275, Section 3.18.

Several factors should be considered in determining whether the officer had reasonable grounds for believing that the defendant might be guilty of a felony. The factors include the statute which was violated and the circumstances existing at the time of the arrest and thereafter.

Consideration first should be given to the penalty provision of Section 2915.111, Revised Code, which reads as follows:

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years." It has been held that a crime which may be punishable by imprisonment in the penitentiary or in a jail at the discretion of the court is a felony. *McKelvey v. State* (1912), 87 Ohio St., 1, 7; *Seaman v. State* (1922), 106 Ohio St., 177, 179. It is to be noted, however, that in this case the court has no discretion. The statute clearly makes the first offense a misdemeanor and subsequent offenses felonies.

Consideration should also be given to the circumstances at the time of the defendant's arrest and thereafter. These circumstances must be taken to be as stated by a single Cleveland police officer called to testify on the defendant's motion to suppress evidence, since as stated in the record there is no other evidence before this court. The officer testified that when he left the police station on

November 10, 1961, he had a police picture of defendant, knew of three arrests of defendant in 1959 for clearing-house operations,* had received information from an informer (whose identity he would not reveal) and "had in mind looking for him [defendant] in the area of East 115th Street and Beulah." A few minutes before 1:00 that afternoon, he first saw defendant driving his automobile lawfully north on East 115th Street. The officer and other officers identified themselves and requested defendant to pull over to the curb as he turned east on Beulah. The officer admitted that defendant was not stopped for any traffic offense.

After defendant stopped, apparently the arresting officer and other officers searched his automobile. The arresting officer testified that while defendant's car was being searched, "I placed him [defendant] under arrest for a clearing house operation, scheme of chance." This occurred at 1:00 p.m. on November 10, 1961. The officer

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* The majority opinion asserts that there was testimony that the defendant had previously been convicted of carrying on a scheme of chance involving clearinghouse slips. Although the arresting officer on direct examination testified that defendant had previous convictions, a careful examination of the testimony shows that he did not clearly indicate what the previous convictions were for. In view of what occurred after the arrest and search and seizure, the logical conclusion is that if the convictions were for clearinghouse-slip violations they were convictions under the Cleveland Municipal Code and not under Section 2915.111, Revised Code. Had they been under the state statute, the prosecuting authorities undoubtedly would have taken advantage of the subsequent offense provision of the statute.

It also should be noted that the arresting officer on redirect examination testified as follows:

"Q. You indicated that you knew of Mr. Beck's previous record? A. Yes, I did.

"Q. What was that, sir? A. Three arrests for clearing house violations.

"Q. When was this? A. They were all during the year 1959, I believe."

also testified that the search of the automobile disclosed nothing other than a hunting knife. Defendant then was taken to the Fifth District Police Station where his person was searched. During this search an envelope of clearing-house slips was found "beneath the sock of [*sic*] his leg."

Defendant was arraigned in the Cleveland Municipal Court on November 13, 1961, and entered a plea of not guilty. Thereafter on December 4, 1961, defendant filed a motion to suppress the policy slips seized and "all conversations after said illegal arrest," on the ground that the "arrest, search and seizure was without authority, unwarranted, illegal, unreasonable, unconstitutionally [*sic*] and void in that it violates the Fourth Amendment of the Constitution of the United States and the use of any property seized as alleged evidence infringes upon the privilege against self-incrimination, as guaranteed by the Fifth Amendment to the Constitution of the United States."

Following a hearing on the motion, which was denied, it was stipulated that the evidence presented on the motion would be the same as would be presented at the trial of the cause. The court thereupon found defendant guilty and he was sentenced to pay a fine of $500 and the costs.

From the recital of facts surrounding the arrest and subsequent events, it is apparent that the opinion of the complaining witness, the police prosecutor and the Cleveland Municipal Court was that "a subsequent offense" does not exist so as to make an accused guilty of a felony unless the accused had earlier been convicted of violating Section 2915.111. In other words, the mere fact that defendant in this case may have been arrested on previous occasions for possible violations of Section 2915.111 did not make the arrest on November 10, 1961, one for a felony.

Notwithstanding the stated belief of the arresting officer, in view of the provisions of the statute under which the defendant was charged and circumstances existing at the time of his arrest and thereafter, it seems clear that the defendant was arrested in this case for a misdemeanor, the validity of which arrest must be determined under Section 2935.03, Revised Code.

Consistent with the heading that "Officer may arrest on view," Section 2935.03, Revised Code, provides in pertinent part:

"A * * * police officer shall arrest and detain a person *found violating a law of this state, or an ordinance of a municipal* corporation, until a warrant can be obtained." (Emphasis supplied.) Since Section 2935.04, Revised Code, is expressly limited to the right to arrest a felon without a warrant, it is obvious that the above-quoted statute states the rule relative to the right of named peace officers to arrest misdemeanants without warrants. In my opinion the phraseology "found violating a law of this state, or an ordinance of a municipal corporation" is the equivalent of the more usual rubric, viz., a "crime committed in the presence" of an officer.

As a rule, for a misdemeanor to be committed in the presence of an officer, the facts or elements constituting the offense must be revealed in the presence of the officer and the officer must perceive that the offense is being committed. The offense is committed in the presence or view of the officer when the officer receives knowledge of the commission of the offense through any of his senses, or by inferences properly to be drawn from the testimony of his senses. Accordingly, where through the sense of sight, or smell, or hearing, the officer receives knowledge that a misdemeanor is being committed in his presence he may

arrest the offender without a warrant. 6 Corpus Juris Secundum 580, 582, Arrest, Section 5.

In many types of crimes the suspect is actively doing something, such as breaking, entering, brandishing a knife, burning property, striking an antagonist, or using profane language, which the officer can see, hear, or smell. The violation of law occurring at the time of the defendant's arrest here, however, consisted solely of his having custody or control of a packet of clearinghouse slips under his sock and inside his trousers. Obviously, the officer could neither see, hear nor smell the packet which was unlawfully possessed. In my opinion this misdemeanor was not committed in the presence of the police officer, or, in the terms of the statute, the defendant was not "*found* violating a law of this state" by the officer, thereby justifying the arrest without a warrant.

To avoid any misunderstanding, I do not assert that the act of possessing contraband materials never can be committed in the presence of an officer. Obviously, if the officer were to see the clearinghouse slips in the hand of the suspect or enough of the slip protruding above a pocket of the suspect to identify it as a clearinghouse slip, the crime of possessing clearinghouse tickets would be committed in his presence.

The problem here is to strike a balance between the public interest in the prevention of crime and the speedy apprehension of criminals and the interest of the individual in freedom from interference at the hands of the law. Nothing I have said should be taken as condoning the activities of this defendant. But, regardless of the conduct of this defendant, I am firmly convinced that the due-process requirements of the common law and constitutional provisions are not to be overlooked. The court must protect the fundamental rights of its citizens even

though in doing so the guilty may at times escape punishment. This is the price which a free society must pay to protect its freedom. We can not ignore the rights of some of the people without doing violence to the rights of all.

There is no place today for a procedure by which a police officer can justify an arrest by the results of his unlawful search and seizure. In other words, an unlawful arrest may not be made legal by the contraband seized. The end can not justify the means.

Particularly important in the instant case are the facts that the courthouse was open and that the arresting officer, knowing that he was "looking for him [defendant] in the area of East 115th Street and Beulah," had ample time in which to secure a warrant. There is no indication that the arrest was made without a warrant in order to prevent a threatened escape.

Under all the circumstances of this case, I believe that the arrest was unlawful. Hence the search and seizure was unreasonable and in contravention of the Fourth Amendment of the Constitution of the United States and Section 14, Article I of the Ohio Constitution. Accordingly, the ruling of *Mapp v. Ohio* (1961), 367 U. S., 643, requires that the judgment of the Court of Appeals in this case should be reversed and the cause remanded for further proceedings without the use of evidence obtained by the unlawful search and seizure.

TAFT, C.J., concurs in the foregoing dissenting opinion.